Supreme Court, U.S.
FILED
MAR 27 1998
CLERK

No. 97-1229

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,
v.
NEW YORK LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR L. BAILEY
(Counsel of Record)
J. WALKER JOHNSON
LISA M. ZARLENGA
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-6409

GERALD KAPLAN
MICHAEL M. OLESKE
NEW YORK LIFE INSURANCE COMPANY
51 Madison Avenue
New York, New York 10010

Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34 pp

QUESTIONS PRESENTED

1. Whether the Court of Federal Claims, applying a facts and circumstances approach, properly held that a taxpayer remittance relating to disputed taxes that the Internal Revenue Service failed to assess constituted a "deposit" rather than a "payment" of such taxes.

2. Whether the Court of Federal Claims properly exercised its jurisdiction under the Tucker Act, 28 U.S.C.A. § 1491(a)(1) (1994 & Supp. 1997), to order the return of a deposit of taxes improperly retained by the Internal Revenue Service.

LIST OF PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

The names of all parties appear in the case caption. Respondent New York Life Insurance Company has no parent company, and only one of its subsidiaries, Express Scripts, Inc., has issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES, PARENT COMPANIES, AND SUBSIDIARIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW AND JURISDICTION	1
STATUTES INVOLVED	1
COUNTER STATEMENT OF THE CASE	1
ARGUMENT	10
I. THE COURT OF APPEALS' DECISION THAT THE REMITTANCE WAS A DEPOSIT DOES NOT COME WITHIN THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI	10
A. The Decision Below Presents No Conflict With Decisions of Other Courts of Appeals and Properly Applies This Court's Decision in the *Rosenman* Case	10
B. The Case Law and the Code Provide a Well-Defined Regime for the Administration of the Tax Laws Relating to Assessments	16
C. The Decision Below That the Remittance Constitutes a Deposit Is Clearly Correct	19
II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TRIAL COURT'S EXERCISE OF JURISDICTION UNDER THE TUCKER ACT	20
A. The Efficient Administration of the Tax Laws Is In No Way Imperiled by the Jurisdictional Decision of the Court of Appeals	20

TABLE OF CONTENTS—Continued

Page

B. The Court of Appeals Applied Well-Settled Case Law in Holding That the Trial Court Properly Exercised Jurisdiction in This Case 21

C. The Court of Appeals Correctly Held That the Instant Case Presents a Claim Under the Tucker Act 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page

Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970) 11
American Mut. Life Ins. Co. v. United States, 93-2 U.S.T.C. (CCH) ¶ 50,652 (S.D. Iowa 1993), *rev'd*, 43 F.3d 1172 (8th Cir. 1994), *cert. denied*, 516 U.S. 930 (1995) 8
American Mut. Life Ins. Co. v. United States, No. 96-174 T (Fed. Cl. complaint filed Apr. 2, 1996) .. 8-9
American Mut. Life Ins. Co. v. United States, No. 96-170 T (Fed. Cl. complaint filed Mar. 28, 1996) 9
Charles Leich & Co. v. United States, 329 F.2d 649 (Ct. Cl. 1964) 11
Clapp v. United States, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 384 U.S. 834 (1954) 21, 22, 24
Cohen v. United States, 995 F.2d 205 (Fed. Cir. 1993) 2, 9, 11, 12, 13, 15
CUNA Mut. Life Ins. Co. v. United States, 97-2 U.S.T.C. (CCH) ¶ 50,904 (Fed. Cl. 1997) 8
Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967) 21, 22, 23
Ehle v. United States, 720 F.2d 1096 (9th Cir. 1983) 13
Essex v. Vinal, 499 F.2d 226 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975) 11
Ewing v. United States, 914 F.2d 499 (4th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) ... 11, 12, 14, 15
Fisher v. United States, 28 Fed. Cl. 88 (1993) .. 11, 14, 15
Flora v. United States, 362 U.S. 145 (1960) 23
Ford v. United States, 618 F.2d 357 (5th Cir. 1980) 10-11
Fortugno v. Commissioner, 353 F.2d 429 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966) .. 11, 12, 15
Gabelman v. Commissioner, 86 F.3d 609 (6th Cir. 1996) 12
Harden v. United States, 74 F.3d 1237 (5th Cir. 1995) 9, 12

TABLE OF AUTHORITIES—Continued

	Page
Indianapolis Life Ins. Co. v. United States, 940 F. Supp. 1370 (D. Ind. 1996), *aff'd*, 115 F.3d 430 (7th Cir. 1997)	8
Lewis v. Reynolds, 284 U.S. 281, *modified*, 284 U.S. 599 (1932)	7, 23
Lewyt Corp. v. Commissioner, 215 F.2d 518 (2d Cir. 1954), *aff'd in part and rev'd in part on other grounds*, 349 U.S. 237 (1955)	11
Moran v. United States, 63 F.3d 663 (7th Cir. 1995)	12, 14, 15
Northern Natural Gas Co. v. United States, 354 F.2d 310 (Ct. Cl. 1965)	11
Pan Am. World Airways v. United States, 122 F. Supp. 682 (Ct. Cl. 1954)	21
Plankinton v. United States, 267 F.2d 278 (7th Cir. 1959)	13
Rosenman v. United States, 323 U.S. 658 (1945)	10, 19
South Puerto Rico Sugar Co. Trading v. United States, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965)	21
Thomas v. Mercantile Nat'l Bank, 204 F.2d 943 (5th Cir. 1953)	11
United States v. Brockamp, 117 S. Ct. 849 (1997)	19
United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956)	11
United States v. Mitchell, 445 U.S. 535 (1980)	3
United States v. Mitchell, 463 U.S. 206 (1983)	3
United States v. Testan, 424 U.S. 392 (1976)	21, 23
Weigand v. United States, 760 F.2d 1072 (10th Cir. 1985)	12
Zeier v. United States, 80 F.3d 1360 (9th Cir. 1996)	13, 14

STATUTES

28 U.S.C.A. § 1346(a)(1)	7
28 U.S.C.A. § 1346(a)(2)	15
28 U.S.C.A. § 1491(a)(1)	2, 15
Internal Revenue Code	
§ 809	3, 25
§ 6151(a)	13

TABLE OF AUTHORITIES—Continued

Page

§ 6201(a) 17
§ 6203 17
§ 6213(a) 17
§ 6213(b)(3) 17
§ 6213(b)(4) 16, 17, 18
§ 6213(d) 17
§ 6322 17
§ 6501(a) 17
§ 6513 13
§ 7422(a) 7, 15, 20, 23, 25

TREASURY DETERMINATIONS

Announcement 88-47, 1988-12 I.R.B. 56 (Mar. 21, 1988) 8
Notice 88-106, 1988-2 C.B. 444 (Sept. 13, 1988) 8
Rev. Proc. 64-13, 1964-1 C.B. 674 18
Rev. Proc. 84-58, 1984-2 C.B. 501 ..... 5, 6, 19
Rev. Rul. 89-6, 1989-1 C.B. 119 19

MISCELLANEOUS

I.R.M. § 8273(2) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1229

UNITED STATES OF AMERICA,
Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the Petition (Pet. at 1-2).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Petition (Pet. at 2-3).

COUNTER STATEMENT OF THE CASE

This case involves the consequences of a simple mistake made by the Internal Revenue Service ("IRS") when it failed to assess a proposed tax deficiency, as it was required by law to do, within the statute of limitations.

Following an audit of Respondent New York Life Insurance Company ("New York Life"), the IRS proposed an increase in tax liability for each of the years 1984, 1986, and 1987. New York Life contested the proposed additional taxes and, anticipating litigation to resolve the dispute, remitted three checks to the IRS, with instructions to treat the remittances as payments of contested taxes for 1984, 1986, and 1987. The IRS timely assessed the contested taxes for 1986 and 1987, but, for reasons the government admits it cannot explain, failed to assess the disputed 1984 taxes prior to the expiration of the statute of limitations on assessment. (Indeed, to this date, the contested 1984 taxes have never been assessed.)

When it realized that the contested 1984 taxes had not been assessed and that the statute of limitations on assessment had run, New York Life initiated this proceeding against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C.A. § 1491(a)(1) (1994 & Supp. 1997), to recover its remittance. The trial court, relying on well-established circuit precedent, examined the facts and circumstances surrounding New York Life's remittance. Finding that such facts were indistinguishable from those in *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993), the trial court held that the remittance constituted a "deposit" and not a "payment" of taxes.[1] (Pet. App. at 32a-34a.) The trial court further held that because the remittance was a deposit rather than a payment, the court possessed jurisdiction to hear the case under the Tucker Act, and New York Life was not required to file a refund claim as a precondition to its lawsuit. (Pet. App. at 36a-37a.) The trial court found it so clear that New York

---

[1] The court of appeals agreed that *Cohen* was controlling, noting in its opinion (Pet. App. at 15a) that:

> [T]his is a stronger case than *Cohen* for treating the transmittal as a deposit, since there the Service made an untimely assessment, whereas here it made no assessment at all.

Life was entitled to the immediate return of its deposit that it dispensed with oral argument and directed that its opinion not be published because it lacked precedential value. (Pet. App. at 37a.)

On appeal, in an opinion written by Judge Friedman, the court of appeals affirmed the trial court on both issues. Judge Rader dissented on the jurisdictional issue (Pet. App. at 17a-24a), relying on *United States v. Mitchell*, 445 U.S. 535 (1980), apparently unaware that the case had been overruled by this Court in *United States v. Mitchell*, 463 U.S. 206 (1983).

* * * *

Pursuant to Rule 15.2 of the Rules of this Court, New York Life corrects and supplements the government's Statement of the case as follows:

1. The government omits certain facts that show that the failure to assess taxes was caused by a simple IRS mistake, which easily could have been avoided.

In August 1992, the IRS proposed adjustments to New York Life's income tax liability for the years 1984, 1986, and 1987.[2] One of the contested issues was the proposed disallowance of a deduction for a negative recomputed differential earnings rate ("DER") under section 809 of the Internal Revenue Code (the "Code") for 1987, and the resulting disallowance of a net operating loss carryback from 1987 to 1984. In November 1993, New York Life and the IRS reached a tentative resolution for both 1984 and 1987 (as well as for 1986) under which the negative DER issue (among others) would remain contested, and New York Life would pay a proposed deficiency but retain the right to prosecute a refund claim. Based on this tentative resolution, in December 1993, New York Life remitted three checks to the IRS—one

[2] Although New York Life's 1985 and 1988 tax years were also affected by adjustments proposed by the IRS, the IRS did not assert a tax deficiency for either of those years, and those years are not relevant to the disposition of this case.

for $31,912,823 with respect to its 1984 tax year, one for $1,682,910 with respect to 1986, and one for $887,187 with respect to 1987. The three checks were transmitted with and described in a single letter to the IRS dated December 17, 1993.[3] (Pet. App. at 2a-3a, 28a-29a.)

In March 1994, New York Life submitted to the IRS an executed Form 870-AD offering to waive the restrictions on assessment with respect to the anticipated tax deficiencies for the years 1984, 1986, and 1987. On the form, New York Life continued to expressly reserve the right to file a claim for refund with respect to the contested liabilities for all three years. The IRS did not accept that proffered form, but instead requested that a new form be submitted containing only the tax years 1986 and 1987. New York Life complied with this request. Subsequently, in May 1994, the IRS executed the revised form submitted by New York Life, covering only 1986 and 1987. (Pet. App. at 3a.)

The IRS timely assessed deficiencies for the 1986 and 1987 tax years (*i.e.*, the years listed on the revised form) but failed to assess a deficiency for the 1984 tax

---

[3] In its Petition (Pet. at 4-5), the government mischaracterizes the facts surounding the tentative resolution for 1984, 1986, and 1987. First, the government repeatedly refers (*see* Pet. at 4) to the tentative resolution as a "settlement" of New York Life's tax liability. Although New York Life referred to a "tentative settlement" in the December 17, 1993, letter that accompanied its remittances, there was, in fact, no "settlement" of the tax liability asserted with respect to the negative DER issue. More accurately, the parties reached an "agreement to disagree" regarding this contested issue.

Second, the government asserts (Pet. at 5) that New York Life "does *not* contend that the tax was not owed at the time that it was paid . . ." (emphasis in original). This statement is incorrect; New York Life has never agreed that it owes the tax it remitted with reference to the negative DER issue, and it has at all times disputed the tax liability proposed by the IRS with regard to this issue. The trial court specifically found, on the basis of the undisputed facts, that New York Life "contested liability before, during, and after filing its remittance." (Pet. App. at 33a-34a.)

year. (Pet. App. at 3a-4a, 33a.) In its Petition, the government states (Pet. at 5) that "[h]aving received full payment [for 1984] . . . the [IRS] made no assessment of those taxes," thus implying that the IRS's failure to assess tax for 1984 was linked to the receipt of New York Life's remittance for that year. The receipt of that remittance, however, cannot explain the failure to assess tax, particularly in view of the fact that the IRS also received remittances for 1986 and 1987 that were enclosed with the same transmittal letter, and the IRS did assess taxes for those years.[4] If the IRS had accepted the first form proffered by New York Life, it presumably would have assessed the taxes for 1984, as it did for 1986 and 1987. Moreover, as discussed below (*see infra* note 14), the IRS had other statutory authority to assess the 1984 taxes. The government has never explained why the IRS did not assess the taxes—either by accepting the first form proffered by New York Life or by using any of its other options to assess the taxes.

2. Plainly, New York Life's letter instructed the IRS to treat the $31,912,823 remittance as a payment under Rev. Proc. 84-58, § 4.03, 1984-2 C.B. 501, 502. The government seems to interpret (Pet. at 4-5) New York Life's reference to Rev. Proc. 84-58 as waiving the requirement that the IRS assess tax for 1984. That revenue procedure, however, prescribes a rule that the IRS flatly

---

[4] The trial court rebuffed the government's attempt to blame the taxpayer for the IRS's failure to assess tax for 1984. Rejecting the government's argument that the IRS failed to assess tax because it was misled by New York Life's correspondence, the trial court stated (Pet. App. at 33a):

> Defendant acknowledges in its brief, however, that it does not really know why the IRS failed to assess liability for 1984, especially when it managed to assess plaintiff's liability for another year. Thus, since [government trial counsel has stated that] "one can only speculate" why the IRS failed to timely assess, such failure suggests that the remittance was a deposit. *Cohen*, 995 F.2d at 209. (Footnote references omitted.)

disregarded in this case and that the government has failed to discuss or even cite in its Petition. Section 4.03(4) of Rev. Proc. 84-58 states that:

> If the remittance exceeds the *assessed liability* . . . the balance *will be returned* to the taxpayer, without interest [*i.e.*, will be treated as a deposit], provided the taxpayer has no other outstanding liabilities.

Rev. Proc. 84-58, § 4.03(4), 1984-2 C.B. at 503 (emphasis added).

The government relies on another section of Rev. Proc. 84-58, section 4.03(1), in arguing (Pet. at 4-5) that New York Life's instruction to treat the remittance as a payment was conclusive. Section 4.03(1) provides in relevant part:

> If the Service is unable to determine whether a partial remittance is intended to be a payment of tax or a deposit in the nature of a cash bond, the Service will treat the remittance as a deposit in the nature of a cash bond . . . .[5]

This section, at most, purports to create a default mechanism that favors deposit treatment when the taxpayer's intention is not clear. Most important, section 4.03(1) does not address the specific situation presented here, while section 4.03(4) clearly does. The government ignores section 4.03(4), which provides the applicable rule in situations where the tax is never assessed and makes it

---

[5] Rev. Proc. 84-58, § 4.03(1), 1984-2 C.B. at 503. In its Petition, the government reconstructs the language of section 4.03(1) and inserts the word "only," even though it does not appear in the revenue procedure, thereby changing the plain meaning of section 4.03(1). The government reorders the language (Pet. at 4) to provide that "a remittance will be treated 'as a deposit in the nature of a cash bond' only '[i]f the Service is unable to determine whether a partial remittance is intended to be a payment of a tax or a deposit.'" As so reconstructed, section 4.03(1) cannot be squared with section 4.03(4), which is quoted above in the text but nowhere mentioned in the Petition.

clear that a taxpayer's designation of a remittance of contested taxes as either a payment or deposit will not effect a waiver of the assessment requirement if assessment is otherwise required.

3. The government mischaracterizes the nature of the suit brought by New York Life in the Court of Federal Claims when it states that New York Life "elected" not to proceed with a claim for refund, but instead "elected" to proceed on a recovery-of-deposit theory. (Pet. at 5-6.)

Contrary to the government's Petition, taxpayers are not provided a choice in remedy under the internal revenue laws. A claim for refund may be filed under 28 U.S.C.A. § 1346(a)(1) (1994) and Code § 7422(a) only if the taxpayer has *overpaid* a tax. *Lewis v. Reynolds*, 284 U.S. 281, *modified*, 284 U.S. 599 (1932). As made clear in Judge Friedman's opinion for the court of appeals (Pet. App. at 10a-13a), the existence of a "payment" is a prerequisite to tax refund litigation.

Because New York Life did not make a "payment" of tax, it did not overpay its tax, and it cannot recover its remittance in a tax refund suit, which presupposes a tax overpayment. New York Life accordingly is pursuing the only remedy that is available to it, *i.e.*, an action for the return of a deposit that has been improperly retained by the IRS. As discussed below (*see infra* pp. 20 *et seq.*), such an action is properly maintained under the Tucker Act.

4. The government erroneously attributes an ulterior motive to New York Life in filing this deposit recovery action as opposed to a refund suit. The government asserts (Pet. at 5) that New York Life elected not to file a claim for refund, because its "position on the merits of the [underlying] tax issue was quite weak."

In support of this assertion, the government cites to decisions adverse to taxpayers on the negative DER issue

that were rendered only *after* this deposit recovery action was filed. At the time this action was brought, the only decided case on the negative DER issue was one in which the taxpayer had prevailed. Thus, exactly opposite to the government's implication, New York Life initiated this deposit action, as it was required by law to do, at a time when the only decisional authority on the negative DER issue was favorable.[6]

Also misleading is the government's statement (Pet. at 3) that in claiming a deduction for a negative DER on its 1987 income tax return, New York Life "employed a methodology that had been rejected by the Commissioner." While this statement suggests that New York Life was flouting a well-settled position of the IRS, until the day before New York Life filed its tax return for 1987, the announced position of the IRS was that a negative DER could be used. Announcement 88-47, 1988-12 I.R.B. 56 (Mar. 21, 1988). In Notice 88-106, 1988-2 C.B. 444 (Sept. 13, 1988), the IRS reversed course, without explaining its rationale for doing so, and stated that the DER could not be negative. A controversy between mutual life insurers and the IRS ensued, and that controversy remains the subject of on-going tax litigation. *See CUNA Mut. Life Ins. Co. v. United States*, 97-2 U.S.T.C. ¶ 50,904 (Fed. Cl. 1997), *appeal pending*, No. 98-5033 (Fed. Cir.); *American Mut. Life Ins. Co. v. United*

---

[6] New York Life filed the present suit in October 1994. At that time, the only precedent on the negative DER issue was *American Mut. Life Ins. Co. v. United States*, 93-2 U.S.T.C. (CCH) ¶ 50,652 (S.D. Iowa 1993), a case that had been decided for the taxpayer and was then pending on the government's appeal. While the Eighth Circuit ultimately reversed the district court (43 F.3d 1172 (8th Cir. 1994), *cert. denied*, 516 U.S. 930 (1995)), it did not do so until December 1994, two months *after* the instant suit had been filed.

The other case cited by the government as upholding its position on the negative DER issue was not even filed, let alone decided, at the time New York Life filed suit in this case. *Indianapolis Life Ins. Co. v. United States*, 940 F. Supp. 1370 (D. Ind. 1996), *aff'd*, 115 F.3d 430 (7th Cir. 1997).

States, No. 96-174 T (Fed. Cl. complaint filed Apr. 2, 1996); *American Mut. Life Ins. Co. v. United States*, No. 96-170 T (Fed. Cl. complaint filed Mar. 28, 1996).[7]

5. The government's truncated account of the trial court's deliberations obscures the fact that, in resolving the payment-or-deposit issue, the trial court did apply what the courts have called the "facts and circumstances" approach.[8] The trial court, citing the Federal Circuit's leading case on the issue, *Cohen*, 995 F.2d 205, specifically held that the characterization of a remittance "depends on the particular facts and circumstances of each case." (Pet. App. at 31a.) And, the trial court did weigh the relevant facts, including the following: (i) New York Life's description of its remittance as a "payment," (ii) the IRS's treatment of the remittance as a payment, (iii) New York Life's contest of the underlying tax liability, and (iv) the IRS's failure to timely assess the tax liability.

The government places great emphasis (Pet. at 7, 9) on the statement by the courts below that the remittance was a deposit "as a matter of law." This statement does not imply a rejection of the facts-and-circumstances approach. Rather, it reflects the posture of the case when it was presented to the trial court for decision.

---

[7] In any event, taxpayers are generally free to take positions on their tax returns that are contrary to the position of the IRS. In this case, as it happened, New York Life's claimed deduction was in accord with the position of the IRS as originally announced.

[8] Elsewhere in its Petition (Pet. at 16), in a similar vein, the government describes the Federal Circuit as rejecting a "facts and circumstances" approach in favor of the Fifth Circuit's "per se" rule. In fact, just the opposite is true. In *Cohen*, the Federal Circuit expressly rejected the Fifth Circuit's per se rule. 995 F.2d at 209. Indeed, in its brief submitted to the Fifth Circuit in *Harden v. United States*, 74 F.3d 1237 (5th Cir. 1995), the government urged that court to reject the per se rule in favor of a facts-and-circumstances approach, citing *Cohen* as one of the facts-and-circumstances cases that it—the government—favored. *See*, Brief for the Appellee at 18-19, *Harden v. United States* (No. 95-40046).

This case (like the *Cohen* case before it) was decided on cross motions for summary judgment. The trial court noted (Pet. App. at 29a) that:

> Summary judgment is appropriate when the pleadings raise no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law.

The court then evaluated the undisputed facts and, finding that the facts were substantially identical to those presented in *Cohen*, held that New York Life was entitled to summary judgment "as a matter of law" on the basis of that precedent.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT THE REMITTANCE WAS A DEPOSIT DOES NOT COME WITHIN THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI

A. The Decision Below Presents No Conflict With Decisions of Other Courts of Appeals and Properly Applies this Court's Decision in the *Rosenman* Case.

1. This Court first considered the characterization of taxpayer remittances over 50 years ago in *Rosenman v. United States*, 323 U.S. 658 (1945). In that case, the taxpayer remitted $120,000 prior to both assessment and the issuance of a notice of deficiency. Accompanying the remittance was a letter stating that "[t]his payment is made under protest and duress." *Id.* at 660. Reasoning that "the taxpayer did not discharge what he deemed [to be] a liability nor pay one that was asserted," this Court concluded, in a unanimous decision, that, prior to assessment, the remittance was a deposit and not a payment. *Id.* at 662.

Some courts construe *Rosenman* as prescribing a per se rule under which a remittance is always treated as a deposit in the absence of assessment. *See Ford v. United*

States, 618 F.2d 357 (5th Cir. 1980); *Thomas v. Mercantile Nat'l Bank*, 204 F.2d 943 (5th Cir. 1953).[9]

The prevailing view, however, in the Federal Circuit and elsewhere, applies *Rosenman* as supporting what the courts have characterized as a facts-and-circumstances approach. In cases (like this one) where the tax is contested, the courts applying this approach uniformly treat the remittance as a deposit in the absence of assessment, which was precisely the situation involved in *Rosenman*. *See Cohen*, 995 F.2d 205; *Fortugno v. Commissioner*, 353 F.2d 429 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966); *Lewyt Corp. v. Commissioner*, 215 F.2d 518 (2d Cir. 1954), *aff'd in part and rev'd in part on other grounds*, 349 U.S. 237 (1955); *Charles Leich & Co. v. United States*, 329 F.2d 649 (Ct. Cl. 1964). On the other hand, where the taxpayer does not contest the asserted tax, but rather admits or agrees with it, a remittance is treated as a payment despite the absence of timely assessment. *See Ewing v. United States*, 914 F.2d 499 (4th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991); *Ameel v. United States*, 426 F.2d 1270 (6th Cir. 1970); *Fisher v. United States*, 28 Fed. Cl. 88, 92 (1993); *Northern Natural Gas Co. v. United States*, 354 F.2d 310 (Ct. Cl. 1965).

Although the courts have applied two tests, as will be demonstrated below (*see supra* pp. 13-15), the results in the payment-or-deposit cases have been remarkably consistent. Most important for present purposes, the instant case is not an appropriate vehicle for this Court to resolve the question of which test should be applied, because New York Life is entitled to prevail under both of these tests. Under the per se rule, New York Life would prevail, because the tax, whether or not contested, was not

---

[9] The Eighth Circuit also may apply this per se rule. *Compare United States v. Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956), *with Essex v. Vinal*, 499 F.2d 226 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

assessed; under the facts-and-circumstances approach, New York Life would prevail, because (as the court below held) the unassessed tax was contested at all relevant times.

There is, however, a narrow circumstance where the two tests have produced conflicting results. That circumstance involves a remittance that accompanies a request for an automatic extension of time to file an annual tax return. *Compare Harden v. United States*, 74 F.3d 1237 (5th Cir. 1995) (deposit), *with Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996) (payment), *and Weigand v. United States*, 760 F.2d 1072 (10th Cir. 1985) (payment). That, of course, is not this case, which involves a contested tax liability, and the government itself has recognized that that narrow conflict does not implicate cases such as this one.

In this regard, in its Suggestion for Rehearing En Banc before the Fifth Circuit in *Harden*, the government acknowledged that the facts-and-circumstances test cases (including *Moran v. United States*, 63 F.3d 663 (7th Cir. 1995); *Cohen*, 995 F.2d 205; *Ewing*, 914 F.2d 499; and *Fortugno*, 353 F.2d 429) represent a "line of authority [that] has no real bearing" on the characterization of remittances accompanying a request for extension of time, because such amounts are defined by statute as payments. *See* Appellant's Suggestion for Rehearing En Banc at 8-9, *Harden v. United States* (No. 95-40046). Thus, while the Fifth Circuit's decision in *Harden* created a narrow conflict, there is no need for this Court to resolve that conflict here.[10]

The government also maintains (Pet. at 15) that the holding of the court below would create doubt regarding

---

[10] The government's Suggestion for Rehearing En Banc was denied by the Fifth Circuit, and the government did not seek further review. Neither the decision in *Harden* nor the conflict it created is mentioned in the government's Petition.

the treatment of "routine tax payments," *e.g.*, withholding and estimated taxes and taxes remitted with annual tax returns. This is not so. These routine remittances are treated as payments by reason of specific statutory provisions directing such treatment. *See* Code §§ 6151(a), 6513; *see also Ehle v. United States*, 720 F.2d 1096 (9th Cir. 1983); *Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959). The present case does not involve a routine tax payment, and the decision of the court below thus does not threaten or in any way affect the treatment of such a payment.

2. The government's Petition (Pet. at 16) makes a fundamental and perplexing mistake by treating the Federal Circuit as following the Fifth Circuit's per se rule.[11] In *Cohen*, however, the Federal Circuit expressly rejected a per se rule, holding that "[t]he trial court here correctly rejected recognition of a per se rule and based its decision on the rationale of *Rosenman* and *Charles Leich & Co.*" *Cohen*, 995 F.2d at 209. Citing *Cohen* as controlling precedent, the courts below in this case applied a facts-and-circumstances approach and not the Fifth Circuit's per se rule.

3. In addition, contrary to the government's contention (Pet. at 17), the results in the three cases relied upon by the government are entirely consistent with the court of appeals' holding in this case. Therefore, these cases do not present a circuit conflict that necessitates this Court's review.

---

[11] The government's confusion concerning this point is further evidenced by its erroneous statement (Pet. at 17) that the Federal Circuit has taken the position—in accord with the per se rule—that "there can be no payment of tax before the IRS makes a formal assessment of the . . . tax liability." The quoted passage, which the government states is the Federal Circuit's position, is actually the Ninth Circuit's summary of the position taken *by the taxpayer* in *Zeier v. United States*, 80 F.3d 1360, 1364 (9th Cir. 1996), which the Ninth Circuit ultimately rejected.

In *Zeier v. United States*, 80 F.3d 1360 (9th Cir. 1996), the taxpayer remitted an amount with an estate tax return at the time the return was due. Such remittances are statutorily treated as payments. Code § 6151(a). Thus, *Zeier* presents no conflict.

In *Ewing*, 914 F.2d 499, the taxpayers entered into a closing agreement with the IRS pursuant to Code section 7121 and remitted the amount of uncontested tax agreed upon in the closing agreement. Such amounts were not timely assessed. Consistent with *Rosenman* and the authority applying the facts-and-circumstances rule, the court held that the remittance of an amount in payment of an agreed-upon tax liability constitutes a payment rather than a deposit. Because New York Life contested its tax liability, the present case is distinguishable from, and clearly is not in conflict with, *Ewing*.

In *Fisher v. United States*, 28 Fed. Cl. at 92, the Court of Federal Claims considered as critical the fact that the taxpayer had not contested the tax "at all relevant times" and concluded that the failure to contest the tax at all times justified payment treatment even in the absence of assessment. With this standard in mind, the result in *Moran v. United States*, 63 F.3d 663, relied upon by the government (Pet. at 16-17), is likewise not in conflict with the present case.

In *Moran*, the taxpayer initially contested the tax but later agreed that additional tax was due in connection with a collateral Tax Court proceeding. The Seventh Circuit held that the remittances in issue were payments rather than deposits.[12] Unlike the situations present in

[12] Although the Seventh Circuit in *Moran* was critical of the Federal Circuit's decision in *Cohen*, as explained in the text, the Seventh Circuit reached the same result the Federal Circuit would have reached if it had decided *Moran*. Moreover, the precedential value of *Moran* is undermined by the fact that the district court lacked jurisdiction over that case irrespective of whether the taxpayer's remittances were properly characterized as payments or as

Fisher and *Moran*, the undisputed fact in the present case is that New York Life contested the underlying taxes " 'at all relevant times.' " *Fisher*, 28 Fed. Cl. at 92 (citation omitted).[13]

4. Finally, the government incorrectly characterizes the holding of this Court in *Rosenman* in an apparent attempt to create a conflict between the present case and *Rosenman*. The government argues that the "evident rationale" of *Rosenman* is that the taxpayer and the government have agreed to a "deposit arrangement." (Pet. at 12-13.)

---

deposits. In *Moran*, the district court held that the taxpayer's suit was not for the refund of a tax overpayment, but rather was for the return of a deposit. If, however, the taxpayer's remittances constituted deposits (as found by the district court), the district court was without jurisdiction over the taxpayer's claim, because it exceeded $10,000. Such a claim is cognizable only in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C.A. § 1491(a)(1). *See* 28 U.S.C.A. § 1346(a)(2) (1993 & Supp. 1998). On the other hand, if the taxpayer's remittances constituted payments (as the Seventh Circuit held), the district court nevertheless lacked jurisdiction, because the taxpayer failed to file a timely claim for refund. Code § 7422(a). There was thus no need for either court in *Moran* to resolve the payment-or-deposit question. Although the government raised the jurisdictional defect under Code section 7422(a) in the Seventh Circuit, it failed to raise the obvious jurisdictional issue under 28 U.S.C. § 1346(a)(2) in either the district court or the Seventh Circuit.

[13] Citing *Moran*, 63 F.3d 663, *Cohen*, 995 F.2d 205, *Ewing*, 914 F.2d 499, and *Fortugno*, 353 F.2d 429 (among other cases), the government's Suggestion for Rehearing En Banc in *Harden* acknowledges the consistency in the circuit court decisions, including those of the Federal Circuit, when it states:

> Indeed, in situations not involving a statutorily defined payment, the other circuit courts are virtually unanimous in concluding that the nature of the remittance depends on the taxpayer's "intent" in making the remittance.

Appellant's Suggestion for Rehearing En Banc at 8-9, *Harden v. United States* (No. 95-40046). Two of these cases (*Cohen* and *Fortugno*) reached the same result as the court below did in this case (*i.e.*, the remittance of an unassessed and contested tax was treated as a deposit) employing a facts-and-circumstances approach.

No court has adopted this supposedly "evident" interpretation of *Rosenman*. *Rosenman*, itself, would seem to be at odds with this theory, because the Court ruled the remittance in that case to be a deposit despite the government's opposition to that characterization. Simply put, the government seeks to set aside a half-century of case precedent and replace that precedent with an entirely new theory—a "consensual deposit" theory. This new test would take away from the Federal courts and give to the IRS the sole power to determine whether a remittance will be treated as a payment or deposit, by either agreeing or not agreeing to treat it as a deposit.

B. The Case Law and the Code Provide a Well-Defined Regime for the Administration of the Tax Laws Relating to Assessments.

1. The government makes a variety of claims concerning the difficulties it would encounter if the decision below is permitted to stand. For example, the government asserts (Pet. at 11, 19) that "[r]eview by this Court is warranted to avoid continuing uncertainty and disparate application of the revenue laws," and (Pet. at 19) that this case raises "fundamental issues of tax administration."

The first claim lacks merit, because, as we have already shown, the circuit court decisions in cases involving contested taxes uniformly treat a remittance as a deposit in the absence of assessment. The second claim founders, because the problem in this case is a problem of the IRS's own making, and is one that the IRS can easily cure. Judge Friedman put it best in his opinion for the court below. The IRS, he stated, "can avoid this situation by making a timely assessment of the tax deficiency, which would assure it the right to litigate the merits of the deficiency."[14] (Pet. App. at 16a.) The government should

[14] The IRS had multiple opportunities to assess the 1984 tax here in controversy. First, the IRS had immediate assessment authority under Code section 6213(b)(4), which applies in a case

not be asking this Court to spend its precious time on an issue that the IRS, on its own, is fully capable of resolving. As we have shown, this case is about a missed statute of limitations—nothing more—and there is no need for this Court to review it.

2. In an attempt to excuse the IRS's failure to avail itself of the multiple opportunities it had to assess tax, the government downplays (Pet. at 17) the significance of assessment in the tax system.

An assessment of tax is the formal recording of a taxpayer's tax liability. Code § 6203. Relying on this definition (Pet. at 17), the government contends that the act of assessment is important only in cases where it must collect tax by force. In other cases, according to the government, the act of assessment is nothing more than an internal bookkeeping entry.

This view of assessment is incorrect. Code section 6201(a) provides that the Secretary of the Treasury is "required" to make an assessment of all taxes imposed under the Code. *See also* Code §§ 6501(a) (providing that the tax "shall" be assessed within three years) & § 6322 (providing that assessment gives rise to liability, which, in turn, creates a lien in favor of the IRS).

Moreover, the mere existence of Code section 6213(b)(4) is devastating to the government's position that attributes significance to the act of assessment only in cases where the IRS seeks to compel the payment of taxes.

---

like this one where the taxpayer proffers an advance remittance. Second, the IRS also had immediate assessment authority under Code section 6213(b)(3), because the contested 1984 tax related to a "carryback" adjustment from 1987. Third, the IRS had authority to issue a notice of deficiency and assess this tax pursuant to Code section 6213(a). Fourth, because New York Life submitted to the IRS an executed form offering to waive the restrictions on assessment, which included the anticipated tax deficiency for 1984, Code section 6213(d) would have permitted the IRS to immediately assess without first issuing a notice of deficiency.

Code section 6213(b)(4) proves otherwise, because it grants streamlined assessment power to the IRS, permitting the immediate assessment of a *voluntary* remittance of tax, like the one at issue here. Congress obviously has a different view of the importance of assessment than is found in the government's Petition. The government's position in this case would read section 6213(b)(4) out of the Code.

The government's effort to downplay assessment conflicts with the IRS's own recognition of the importance of assessment. In 1954, Congress amended the Code to grant the Secretary special assessment authority to assess a tax upon receipt of a remittance without first issuing a notice of deficiency. *See* Code § 6213(b)(4). *This is the precise situation in this case.* The IRS relied on this provision as its authority when it first set forth rules regarding advance payments in Rev. Proc. 64-13, 1964-1 C.B. 674, *modified,* Rev. Proc. 82-51, 1982-2 C.B. 839, *superseded,* Rev. Proc. 84-58, 1984-2 C.B. 501. Section 3.03 of Rev. Proc. 64-13 acknowledged the importance of assessment and expressly provided that:

> An advance payment received before the mailing of a notice of deficiency *which is not assessed will be treated as a deposit* . . . .

Id. (emphasis added).

Even the IRS's current internal procedures emphasize the importance of assessment, stating that in the case of advance payments, "additional steps *must be taken* to have the tax assessed" and instructing agents to "assess the liability promptly." I.R.M. § 8273(2) (emphasis added).

3. The government's new "consensual deposit" theory (*see* Pet. at 12-15) is at odds with well-settled legal standards and would otherwise create an unfair and unworkable standing. Such a theory would replace the settled case law and give the IRS the sole power to deter-

mine whether a remittance will be treated as a payment or deposit by either agreeing or not agreeing to treat it as a deposit. This Court long ago presciently ruled out such an approach, explaining that "[i]t will not do to treat the same transaction as payment and not as payment, whichever favors the Government." *Rosenman*, 323 U.S. at 663. Rev. Proc. 84-58 contains a number of ambiguities with respect to the importance of assessment (*compare* § 4.03(1) *with* § 4.03(4)), and IRS "guidance" in this area has been anything but consistent over the years. *See* Rev. Rul. 89-6, 1989-1 C.B. 119 (noting that the IRS had changed its administrative position in Rev. Proc. 84-58). It is thus evident that relying on shifting IRS standards and parsing phrases in taxpayer correspondence will not ensure greater predictability and certainty on the payment-or-deposit issue as claimed by the government.

4. Finally, contrary to the government's contention, the result in this case reinforces and strengthens our system of taxation. This controversy exists only because the IRS made a simple mistake—it failed to assess a disputed tax within the statute of limitations on assessment. When mistakes of this nature are made by taxpayers, the result, while sometimes harsh and unfortunate, is clear. Taxpayers forfeit their rights when the statute of limitations expires, and such forfeitures are imposed even in the face of compelling equitable circumstances and personal hardship, as this Court confirmed recently in the equitable tolling case, *United States v. Brockamp*, 117 S. Ct. 849 (1997). Evenhanded administration of the tax laws requires that the IRS likewise must suffer the consequences of a failure to act within the limitations period.

C. The Decision Below That the Remittance Constitutes a Deposit is Clearly Correct.

Finding that the "significant operational facts in the present case . . . are indistinguishable from those in *Cohen*" (Pet. App. at 14a), the court of appeals held

that its decision in *Cohen* was controlling. In *Cohen*, the Federal Circuit based its decision on the rationale of *Rosenman* and reached a result consistent therewith.

In the present case, the courts below properly analyzed all of the relevant facts. Relying on *Rosenman* and other well-established precedent, the courts below concluded that New York Life's remittance did not discharge an agreed-upon tax liability. The government has failed to explain why this Court should depart from this well-settled precedent. Accordingly, in the absence of assessment, the remittance was properly held to be a deposit.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TRIAL COURT'S EXERCISE OF JURISDICTION UNDER THE TUCKER ACT

A. The Efficient Administration of the Tax Laws Is In No Way Imperiled by the Jurisdictional Decision of the Court of Appeals.

The government asserts (Pet. at 26-27) that Judge Friedman's decision on the jurisdictional issue will create chaos in the administration of the tax laws; that the decision may give taxpayers the option to proceed by way of a refund suit or a Tucker Act claim; and that neither taxpayers nor the government will know with certainty in which forum tax litigation should be commenced. These assertions are utterly without substance.

As we have previously shown (*see supra* p. 7), taxpayers have no choice regarding where and how tax controversies exemplified by this case will be determined. In the typical case where a remittance constitutes a "payment" of tax, a taxpayer will be required to follow the tax refund procedures specified in Code section 7422(a). In the rare case where a remittance constitutes a "deposit," a taxpayer will be unable to follow the tax refund procedures and will have to proceed under the Tucker Act. There is no choice or election on the taxpayer's part;

there is no confusion; and there is no need for intervention by this Court.

Any possible doubt on this score is erased by the fact that it is entirely within the province of the IRS to preclude a taxpayer from proceeding under the Tucker Act. This can be accomplished, as we have previously explained (*see supra* pp. 16-17), by the IRS's simply assessing the tax within the limitations period. The parade of administrative horribles envisioned in the Petition (Pet. at 26-27) is a parade that the IRS has complete power to bring to a halt. If the IRS operates as it should, another case like this one will never arise. There is thus no empirical support for the government's assertion (Pet. at 19) that the decision in this case "involves a matter of the highest recurring importance."

B. The Court of Appeals Applied Well-Settled Case Law in Holding That the Trial Court Properly Exercised Jurisdiction in This Case.

The government asserts (Pet. at 20-21) that the court of appeals adopted a "novel jurisdictional theory" in order to hold that the Tucker Act provides jurisdiction for New York Life's claim. The Federal Circuit did no such thing. To the contrary, the theory on which it relied dates back to the Court of Claims' 1954 decision in *Clapp v. United States*, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954), and has been consistently applied since then. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. Trading v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Pan Am. World Airways v. United States*, 122 F. Supp. 682 (Ct. Cl. 1954). Moreover, this theory has been specifically recognized and endorsed by this Court. *United States v. Testan*, 424 U.S. 392, 401-02 (1976).

The Tucker Act confers jurisdiction on the Court of Federal Claims if a claim is "founded upon any Act of

Congress." The line of cases beginning with *Clapp* recognizes that there are two classes of noncontractual money claims that fall within the Tucker Act.[15] One class involves cases in which money has not been paid to the government, but the claimant seeks money damages from the government. These cases must be brought pursuant to a particular authorizing provision of law in order to be founded upon "any Act of Congress." *Eastport*, 372 F.2d at 1007-08. A second class involves cases (like this one) in which " 'the Government has the citizen's money in its pocket,' " and the citizen seeks to recover the funds. *Id.* at 1008 (citation omitted). In these cases, it is sufficient that the money was improperly paid, exacted, or taken by the government under a " 'power supposedly conferred by statute.' " *Id.* (citing *Clapp v. United States*, 117 F. Supp. at 580). Thus, unlike the claimant in the class of cases involving money damages, a claimant in this second class of cases need not point to a particular statute authorizing recovery. As the court in *Clapp* explained:

> Our best estimate of the present law is that a claim to recover an illegal exaction made by officials of the Government, which exaction is based upon a *power supposedly conferring by statute*, is a claim "founded upon any Act of Congress."

Clapp, 117 F. Supp. at 580 (emphasis added).

This Court has distinguished claims for money damages, on the one hand, from claims for money "improperly exacted or retained," on the other, recognizing that claims for the return of money remitted to the government are

---

[15] We have no quarrel with the government's statement (Pet. at 22) that Tucker Act jurisdiction also lies for claims against the United States arising out of express or implied contracts with the government. The issue in this case, however, is the scope of Tucker Act jurisdiction for noncontractual money claims. As we will now show, the government has not adequately described the two classes of noncontractual money claims that are cognizable under the Tucker Act.

different from claims for money damages where no such remittance has been made. Simply put, the first class requires a statute specifically mandating the award of money damages, whereas the second class does not. *See Testan*, 424 U.S. at 401-02 (citing *Eastport*, 372 F.2d at 1008, 1009). This Court stated more than 20 years ago that it would not "tamper with [the] established principles [set forth in *Eastport*]," *id.* at 400, and it has not done so. Review of the jurisdictional issue presented here thus is not warranted on the ground, advanced by the government, that the court below adopted a novel jurisdictional theory.

C. The Court of Appeals Correctly Held That the Instant Case Presents a Claim Under the Tucker Act.

1. The government notes (Pet. at 23-24) that Code section 7422(a) provides an "express statutory scheme" that governs recovery in tax cases. The government asserts that the references in Code section 7422(a) to "any tax" or "any sum" indicate that this provision was intended to provide the exclusive remedy in disputed tax cases. However, because New York Life's remittance constituted a "deposit" and not a "payment" of tax, the tax refund regime of Code section 7422(a) is not relevant to the disposition of this case. That section applies only where a taxpayer seeks a refund of an overpayment of tax, which has its source in a "payment" of tax. Irrelevant for the same reason are this Court's decisions in *Lewis v. Reynolds*, 284 U.S. 281, and *Flora v. United States*, 362 U.S. 145 (1960), upon which the government heavily relies (Pet. at 24). Those cases control where a taxpayer seeks the refund of an overpayment of tax. Again, that is not this case, since New York Life seeks only the return of its deposit.

The government's position could have the bizarre consequence of leaving New York Life without any remedy. The government recognizes (Pet. at 22) that if the IRS

concedes that a remittance is a deposit (*i.e.*, under an express or implied-in-fact contract theory), the taxpayer, pursuant to the Tucker Act, may bring an action in the Court of Federal Claims to recover the deposit. If, however, New York Life's remittance is properly characterized as a deposit, but the government were to prevail on the jurisdictional issue, New York Life would be precluded from recovering its deposit in a refund suit (since only tax overpayments can be recovered in such suits), and would also be unable to bring an action pursuant to the Tucker Act in the Court of Federal Claims.

2. There remains only the question whether New York Life's claim for the return of its deposit falls within the first or the second class of cases delineated in the *Clapp*, *Eastport*, and *Testan* decisions. As will be recalled, the first class of cases includes those where money has not been paid to the government, but where the claimant seeks money damages from the government. In order to bring a case of this sort, the claimant must point to a particular statute that allows the award of money damages. New York Life's claim does not fall within this first class of cases, both because New York Life made a remittance to the government and because there is no statute permitting the award of money damages in the circumstances of this case.

The second class of cases includes those where a remittance has been made, and the claimant seeks to recover the funds remitted to the government. As to this class of cases, *Clapp*, *Eastport*, and *Testan* teach that it is unnecessary to point to a particular statute that requires or permits money to be returned to the claimant; it is enough that the money was improperly paid, exacted, or retained by the government under a "power supposedly conferred by statute." *Clapp*, 117 F. Supp. at 580. New York Life's claim falls squarely within this second class of cases. As discussed above (*see supra* pp. 16-17), New York Life made a remittance of contested taxes, which the IRS failed to assess, but nevertheless retained under a power sup-

posedly conferred upon it by statute—in this instance, the provisions of the Internal Revenue Code, *e.g.*, Code section 7422(a). As a consequence of the IRS's failure to assess, however, the remittance constitutes a deposit, which, as we have shown, the IRS has no authority to retain under any power granted by the Code. Tucker Act jurisdiction thus attached to New York Life's claim and empowered the Court of Federal Claims to direct the IRS to return New York Life's deposit.

3. The government is in error in suggesting (Pet. at 25) that the court of appeals' reference to Code section 809 (Pet. App. at 21-22) means that the court resolved the merits of the underlying tax controversy. The 1984 taxes disputed in this case arose because the IRS applied Code section 809 in a way that reduced the amount of deductions claimed thereunder by New York Life. Contrary to the suggestion in the Petition, the court of appeals did not decide whether the IRS acted properly in reducing these deductions. Nor did the majority predicate Tucker Act jurisdiction on a finding or decision that the IRS's interpretation of Code section 809 was incorrect. To the contrary, Judge Friedman made it absolutely clear that the court was not reaching the merits of New York Life's claim under Code section 809, declaring (Pet. App. at 16a) that "the essence of a deposit is that the taxpayer is entitled to recover it without regard to the merits of the underlying tax claim." The reference in the majority's opinion to section 809 was merely a reference to the Code section that gave rise to the underlying tax controversy. In order to establish its authority to retain the remitted and disputed taxes, the IRS was required to assess the taxes in question. Because it failed to do so, the IRS retained, without legal authority, funds that belong to, and that must be returned to, New York Life.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR L. BAILEY
(Counsel of Record)
J. WALKER JOHNSON
LISA M. ZARLENGA
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-6409

GERALD KAPLAN
MICHAEL M. OLESKE
NEW YORK LIFE INSURANCE COMPANY
51 Madison Avenue
New York, New York 10010

Attorneys for Respondent

MARCH 1998